RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Maine.

ALEXANDER DUNN v. GRAND TRUNK RAILWAY COMPANY OF CANADA.

If a person enters the saloon-car of a freight railway train, and, when the train starts, without being requested or directed to leave, remains there as a passenger, contrary to the rules of the company, but with the knowledge of the conductor, who receives from him the usual fare of a first-class passenger, the corporation incurs the same liability for his safety as if he were in their regular passenger train.

On exceptions to the rulings of the Superior Court for the county of *Cumberland.*

Case for an injury alleged to have been received in July, 1868, while being transported from South Paris to Danville Junction, through the alleged insufficiency of the track and cars of the defendants, and the careless and negligent manner of managing them.

There was evidence tending to show that the plaintiff entered the saloon-car attached to the defendants' freight train, at South Paris station, for the purpose of going to Danville Junction; that the conductor saw him when the train started, and they conversed together; that he paid the conductor the usual fare of eighty-five cents; that the saloon-car was thrown from the track and dumped; that the plaintiff was thereby injured; that the car was thrown off by a broken rail, and that the fare was thereupon paid back.

There was evidence on the part of the defence, tending to show that the conductor notified the plaintiff when the train started that he had no right to carry passengers on the freight train, which was denied by the plaintiff.

It also appeared that the defendants issued a notice on May 23d 1866, that after that date "passengers would not be allowed to travel by freight trains on that part of the line between Portland and South Paris." On September 8th 1868, they issued notice that "no passengers will be carried in the brake-vans attached to freight trains without written authority from the superintendent. * * * Any conductor allowing a passenger to travel in the brake-van, or on any part of the freight train, will be dismissed."

The defendants requested the presiding judge to instruct the jury:

1. That the plaintiff was not entitled by law to be carried in the freight train of defendant company as a passenger, unless by permission obtained before he entered the train from some authorized agent of defendants; and that if the jury find that plaintiff entered the freight train at South Paris without such permission, then that plaintiff is not entitled to recover for the alleged injury, and their verdict should be for defendants.

2. That if the jury find that the defendant company, before the time of the injury received as alleged by the plaintiff, had established and published a regulation by which passengers were not allowed to travel by freight trains on that part of the line between Portland and South Paris, and that such regulation was in force at that time, then the plaintiff is not entitled to recover in this action, and their verdict should be for the defendants.

The judge did instruct the jury, *inter alia*, as follows: "I understand that the defence is substantially this, that inasmuch as notices had been issued and published by the directors of the company, prohibiting passengers from riding on freight trains, therefore this passenger being upon a freight train, the company was not liable for the injury that he received, though the company would have been liable if he had been in a passenger train. If there is any other defence, you have noticed it, and of course you will give them the benefit of it.

"I have been requested to give you a number of instructions touching this particular point, all of which I decline to give except this:

"I do instruct you, for the purposes of this case, that the plaintiff was not entitled by law to be carried on the freight train of defendant company, as a passenger, unless by permission obtained before he entered the train from some authorized agent of defendants. I give you that one, and no more. But I also instruct you, that if you find that the plaintiff was allowed by the conductor, upon his entering that car, and upon the starting of the train, to remain as a passenger on that train, in a saloon-car; that on a full knowledge of the facts, the conductor on that train allowed and authorized that man to remain there without directing him to get off, or any attempt to put him off, and that afterwards he received from him pay as a first-class passenger, not

only to the next station where the freight train was to stop, but beyond that station to Danville Junction, a further point on the road where the plaintiff desired to go (for I understand the evidence is that he was going to Lewiston, and Danville Junction was the furthest possible point in that direction on this road), then I instruct you that the defendant company cannot plead their regulation in release of their ordinary legal liabilities, but they are just as liable as if it had been a passenger train, and as if there had been no notices, provided that the plaintiff was not guilty of any fault or want of ordinary care himself."

The verdict was for the plaintiff, and the defendants alleged exceptions.

P. Barnes, for the defendants, cited *Lygo* v. *Newbold*, 9 Ex. 302; *Lucas* v. *Taunton & N. B. Railroad Co.*, 6 Gray 70; 2 Redfield 114, 3d ed.; *Elkins* v. *Boston & Maine Railroad Co.*, 3 Foster 275; *Robertson* v. *N. Y. & E. Railroad Co.*, 22 Barb. 91; *C. C. & C. R.* v. *Bertram*, 11 Ohio 457.

T. H. Haskell, for the plaintiff.

APPLETON, C. J.—The defendants are common carriers of passengers and freight. They may carry freight in their passenger train, or passengers on their freight train. They have a right to make all reasonable rules and regulations in the management of their business, with which those in their employ, or those making use of their means of conveyance, are bound to conform when informed of their existence.

By one of the regulations of the defendant corporation, after May 23d 1866, passengers were not "allowed to travel by freight trains on that part of the line between Portland and South Paris. The regulation was a reasonable one, and the defendants were authorized to make it. It is, however, fairly inferable from the regulation itself that previously passengers had been permitted to travel by the freight train. By the notice of September 8th 1868, dated at Montreal, no passengers were to be carried in the brake-vans attached to freight trains "without written authority from the superintendent." And "any conductor allowing a passenger to travel on the brake-van, or any part of the freight train, will be dismissed."

The plaintiff went aboard the freight train, in the saloon-car, and was there with the knowledge of the conductor. It was the duty of the conductor to inform him of this regulation, if it was to be enforced, and request him to leave. If no notice was given of this rule, and no request to leave, but instead thereof the usual fare was received, he had a right to suppose himself rightfully on board, and entitled to all the rights of a passenger. Every one riding in a railroad car is, *primâ facie*, presumed to be there lawfully as a passenger, having paid or being liable, when called on, to pay his fare, and the *onus* is upon the carrier to prove affirmatively that he was a trespasser: *Penn. Railroad Co.* v. *Books*, 7 Am. Law Reg. N. S. 529. If not being rightfully on board, and being advised thereof, the plaintiff neglected or refused to leave, the conductor had a right to remove him, using no more force than was necessary to accomplish that object: *Fulton* v. *G. T. Railway*, 17 Up. Can. 428; *Hilliard* v. *Goold*, 34 N. H. 230; *State* v. *Goold*, 53 Maine 279.

The regulations of the defendant corporation are binding on its servants. Passengers are not presumed to know them. Their knowledge must be affirmatively proved. If the servants of the corporation, who are bound to know its regulations, neglect or violate them, the principal should bear the loss or injury arising from such neglect or violation, rather than strangers. The corporation selects and appoints its servants, and it should be responsible for their conduct while in its employ. It alone has the right and the power of removal.

A passenger goes on board a freight train, enters the saloon-car, and remains there when the train starts, against the rules of the company, but with the knowledge of the conductor, and is not directed or requested to leave, but pays the usual fare of a first-class passenger to such conductor, and is injured on his passage by the negligence or carelessness of the railroad corporation. Is he entitled to compensation for such injury? If inert matter be injured or destroyed by the negligence or carelessness of a common carrier, its owner can maintain an action, and recover damages as a recompense for such injury. Is the traveller entitled to the protection of the law, when the negligence of the carrier destroys his goods, and without its protection, when the same negligence injures his health or breaks his limbs? If any extraordinary danger arises from the violation of the known rules

of the company, as by standing on the cars when in motion, the passenger violating the rules assumes the special risks resulting from such violation. But if the act of the passenger in no way conduces to the injury received, the carrier must be held responsible for the necessary consequences of his negligence or want of care: *Baker* v. *Portland*, 10 Am. Law Reg. N. S. 559.

In *Zump* v. *W. & M. Railroad Co.*, 9 Rich. (S. C.) 84, there were two cars on the train, and the plaintiff's seat was in the forward car. Near the door on the rearward car was a notice that passengers should not stand on the platform. The train was running over an unfinished part of the road. The cross-ties were too far apart, and were insufficiently spiked, and the accident arose from "the breaking of the cleat at the end of one of the rails." All the other passengers were inside the cars, and none of them injured. The defence was that the injury arose from the plaintiff's own fault in standing upon the platform while the cars were in motion. The verdict was for the plaintiff, which the court refused to set aside, holding that whether the plaintiff had notice that the platform was a prohibited place, and if so, then whether under the circumstances his own act so contributed to the injury as to exonerate the railroad, who were guilty of negligence, were for the jury. The plaintiff's seat, "it will be recollected," observes O'NEALE, J., "was in the forward car; the notice proved was in the rear car, on the platform of which he was standing when the accident occurred. That such notice is not enough to change the liability of the company to a passenger, is, I think, clear from Story on Bailment, § 558. If the conductor had said to the plaintiff, as was his duty, 'you are in an improper place,' and he had then persisted in remaining, it might have been that this would have excused the company from any consequences which might have followed." An action was brought against a railroad company by a passenger, while travelling in one of its gravel trains. The defendant asked the court to instruct the jury that a railroad company was not liable for an injury which might happen to one taking passage in a gravel train, and not engaged in carrying passengers. This requested instruction was held to be properly denied in *Lawrenceburgh & Up. Miss. Railroad Co.* v. *Montgomery*, 7 Porter (Ind.) 475, the court holding that in a suit brought against a railroad for an injury occasioned by a collision, it was not sufficient for the com-

pany to show that the plaintiff was acting at the time in disobedience of a proper order to secure his safety, but that it should also appear that the injury was occasioned by such disobedience. In *Watson* v. *Northern Railway Co.*, 24 Up. Can. (Q. B.) 98, the plaintiff travelling in the defendants' train on a passenger ticket, went into the express company's compartment of a car. While there, owing to the negligence of the defendants' servants, the train, which was stationary, was run into by another coming up behind it, and the plaintiff's arm was broken. No person in the passenger cars was seriously injured. It was proved that notice that the passengers were not allowed to ride in the baggage-car was usually posted upon the inside of the door of the passenger-cars, but it was not distinctly shown that it was there on that day. The jury found that the plaintiff was wrongfully in the car, but that he was not told where to go when he bought his ticket, nor did the conductor order him out, and so he was not to blame. "In my opinion," observes DRAPER, C. J., "the jury were warranted in finding that the plaintiff did not so contribute (to the injury) as to deprive him of the right to recover. Giving the fullest weight to the considerations urged in the defence,—such as the ticket which the plaintiff had, the notices stated to have been kept up in the cars, conceding the plaintiff saw them, though it is not proved,—I do not think they preclude the plaintiff from recovering, when the injury he sustained was occasioned by collision resulting entirely and directly from the gross negligence of the defendants' servants." In *O'Donnel* v. *Alleghany Valley Railroad Co.*, 59 Penn. 239, in a suit by an employee of a railroad company, who held the relation of a passenger, the court charged that the baggage-car is an improper place for a passenger to ride,—whether the rule against it was communicated to him or not, if he left his seat in a passenger-car and went into the baggage-car, it was negligence which nothing less than a direction or an invitation of the conductor could excuse,—and such invitation should not be inferred from his having ridden there frequently with the knowledge of the conductor without his objection. Held to be error.

That a railroad corporation cannot repudiate the acts of its agents so as to free themselves from responsibility, for their negligence, was held in *Lackawanna & Bloomsburgh Railroad Co.* v. *Chenowith*, 6 Am. Law Reg. N. S. 93, when the agents of a rail-

road company, contrary to the instructions and rules of the company, at the request of the owner of a freight-car, attached it to a passenger-car, the plaintiff agreeing to run all risks, the plaintiff having sustained a loss by the negligence of the defendant, brought his action for compensation. The same defence was attempted as in the case at bar. The plaintiff was not a trespasser, "for," observes THOMPSON, J., "he was there by permission, and under the contract of parties competent to give him authority to be there. * * * When, therefore, they (the defendants) consented to hitch on his (plaintiff's) car to the passenger train, even at his urgent solicitation,—and we have not a particle of evidence that other inducements to do the act were held out, excepting freedom from responsibility as a consequence of the attachment,—we must presume it was done with a view to the compensation to be paid on the one hand, and the usual care to be exercised on the other. The argument, however, is, that the plaintiff was guilty of such a wrong in asking for permitting his car to be attached, that whether the act contributed to the disaster or not, he is to be treated as a trespasser, and not entitled to any compensation for injuries not wilfully done. We think this is not the law, unless, in a case where the will of an agent is controlled and subverted by improper influences, he is induced to do that which is manifestly beyond the scope of his powers. That there was a regulation against running freight trains with passenger-cars may be admitted, although it was not properly proved, yet that neither proved that it might not be safely done, nor that if the company undertook to do it, they might lay aside the duty of care, and commit such cases to the guardianship of chance."

When a railroad company admits passengers into a caboose-car attached to a freight train, to be transported as passengers, and takes the customary fare for the same, it incurs the same liability for the safety of the passengers as though they were in the regular passenger coaches at the time of the occurrence of the injury: *Edgerton* v. *N. Y. & H. Railroad Co.*, 39 N. Y. (12 Tiffany) 227. In *Carrol* v. *N. Y. & N. H. Railroad Co.*, 1 Duer 578, the plaintiff, remarks BOSWORTH, J., "took a seat in the post-office apartment of the baggage-car. The position was injudiciously chosen, and may be assumed to have been known to him to have been a far more dangerous one than a seat in a passenger-car. He took it with the assent of the conductor. He was not there as a tres-

passer, or wrongfully as between him and the defendants. So far as all questions involved in the decision of this action are concerned, he was lawfully there." His being there was not such negligence as would exonerate the defendants from the consequences of their negligence or want of care.

The plaintiff was not entitled by law to be carried on the freight train contrary to the regulations of the defendant company. They might have refused to carry him, and have used force to remove him from the train. Not doing this, nor even requesting him to leave, but suffering him to remain, and receiving from him the ordinary fare, they must be held justly responsible for negligence or want of care in his transportation.

The question before the court was whether the defendants were liable at all as common carriers. The defence was based entirely upon a regulation of the company. There was no question raised as to the general obligations of carriers. Indeed none is raised at the argument. The counsel for defendants rest their defence on the rules of the company. The plaintiff had paid the usual fare of a first-class passenger. The defendants had received it, and had undertaken the transportation of the plaintiff in their freight train, during the course of which he was injured by their neglect or want of care. Under such circumstances, the judge said that they could not "plead their regulation in release of their ordinary liabilities, but they were just as liable as if it had been a passenger train, and as if there had been no notice, provided plaintiff was not guilty of any fault or want of ordinary care himself."

Undoubtedly a passenger taking a freight train takes it with the increased risks and diminution of comfort incident thereto, and if it is managed with the care requisite for such trains, it is all those who embark in it have a right to demand: *The Chicago, B. & Q. Railroad Co.* v. *Hazzard*, 26 Ill. 373. "We have said in *The Chicago & Galena Railroad Co.* v. *Fay*, 16 Ill. 568," observes BREEZE, J., "that a passenger takes all the risks incident to the mode of travel, and the character of the means of conveyance which he selects, the party furnishing the conveyance being only required to adapt the proper care, vigilance, and skill to that particular means; for this, and this only, was the defendant responsible. The passengers can only expect such security as the mode of conveyance affords."

If there was any peculiar risk incident to transportation on a freight train, the counsel should have called the attention of the court to such special difference, whatever it may be. But "the responsibility of a railroad company for the safety of its passengers does not depend on the kind of cars in which they are carried, or on the fact of payment of fare by the passenger:" *Ohio & Miss. Railroad Co.* v. *Mahling*, 30 Ill. 9. "The evidence," says WALKER, J., in that case, "shows that the road had been carrying passengers on their construction trains, and they must be held to the same degree of diligence with that character of train, as with their regular passenger coaches, for the safety of the persons and lives of their passengers."

If the defendants claimed that they might exercise a diminished degree of caution arising from the character of the train, they should have requested a corresponding instruction.

The cases to which our attention has been called, so far as we have been enabled to examine them, are inapplicable. In *Lygo* v. *Newbold*, 9 Exch. 302, the plaintiff contracted with the defendant to carry certain goods for her in his cart. The defendant sent his servant with his cart, and the plaintiff, by the permission of the servant, but without the defendant's authority, rode in the cart with her. On the way the cart broke, and the plaintiff was thrown out and injured. Held, that as the defendant had not contracted to carry plaintiff, and as she had ridden in the cart without his authority, he was not liable for the personal injury she had sustained. But in that case, it does not appear that the defendant was a common carrier,—that he undertook to carry or received, or was to receive any compensation for the carriage of the plaintiff. In *Lucas* v. *New Bedford & Taunton Railroad Co.*, 6 Gray 65, it was held that a person who enters the cars of a railroad corporation, not as a passenger, but for the purpose of assisting an aged and infirm relative to take a seat as a passenger, must, in order to maintain an action against the corporation for an injury sustained while leaving the cars, show that he exercised due care, that the corporation was wanting in ordinary care, and that such negligence was the cause of the injury; and if he attempts to leave the cars after they have started, or finding them in motion as he is going out, persists in making progress to get out, he cannot maintain such action, if his attempt causes or contributes to the injury, even if the corporation give him no

special notice of the time of departure of the cars, and are guilty of negligence in starting the cars, and in a jerk occurring after the first start, which negligence also contributes to the injury. But in that case the plaintiff was not a passenger; he was not there for the purpose of being transported. The servants of the corporation could not know, and were not obliged to know, the purpose for which he came aboard. Besides, the plaintiff must show due care. The implication from the case is, that with due care on the part of the plaintiff, and negligence on part of the corporation, the action was maintainable, and is adverse to the defendants.

Exceptions overruled.

KENT, DICKERSON, BARROWS, and TAPLEY, JJ., concurred.

It cannot be denied that the foregoing case is one of very great interest to the profession; and the opinion of the learned Chief Justice is drawn up with great care and after very deliberate examination of the cases bearing upon the questions involved. We are all accustomed to accept the opinions of that court with so much deference and respect, that we question whether any comment on our part will be regarded as of much account. But we cannot disguise the impression, made upon our own mind by the reading of the statement of the trial in the court below, that the defendants might very naturally have regarded the instructions of the learned judge as requiring of them a somewhat severe measure of duty. The opinion of the Chief Justice in the Supreme Court seems to escape most of the rigors of the case, as presented in the court below, by way of presumption or inference, from the admitted facts in the case. It seems to be assumed, both in the court below and in that of last resort, that the plaintiff was rightfully upon the train, at the time the damage or injury occurred, and that the defendants had made themselves common carriers of passengers so far as the plaintiff was concerned. And if that point is clearly established in the case, there would seem to be no question in regard to the soundness of the views presented in the opinion.

But the case of a passenger injured upon a freight train deserves unquestionably a very different consideration from one, when the injury occurs upon a passenger train. Upon the latter the conductor represents the company to the fullest extent as it regards the entire subject of receiving and transporting, as well as the safe delivery of the passengers. That is his regular employment, and in all that pertains to such employment the conductor stands in the place of the company; and his acts, and his declarations accompanying such acts, will bind the company to the fullest extent. And this is true even as to his omissions and the concessions thereby fairly implied. As, for instance, when the passengers are allowed, by the conductor, to pass from car to car, while the train is in motion, or to stand upon the platforms, or to sit in the baggage or express cars, there can be no fair question, that the company will be bound by his act.

And we should not be inclined to doubt, that where this, or any similar freedom, is constantly allowed the passengers upon passenger trains, without

objection or remonstrance on the part of the conductors, the company must be regarded as having acquiesced in the practice, although in conflict with their general regulations, properly advertised in the cars. We suppose some such relaxation is found indispensable on the American railways, in order to keep the peace with the passengers. For among us there is a considerably numerous and influential class of passengers, who almost insist upon perfect freedom of locomotion and observation, in all places and under all circumstances. The propensity proceeds doubtless from different motives, in different persons. Some do it from mere listlessness and unrest; others from curiosity and to satisfy a morbid sense of inquisitiveness; and others still to show they can do it, and not suffer detriment. There are doubtless many other reasons, as to find out friends and acquaintances, &c. But certain it is, no conductor can control or hinder it if he were ever so much disposed to do so. People, in this country, will insist upon making all the railway tracks common highways for foot passengers; and equally upon climbing about in all directions upon moving passenger trains; and there seems to be no remedy, but to submit to it. They all feel, that it is unsafe for others, but indispensable for themselves to do so. And if railway companies are compelled to submit to it, all that we can say is, that the blame cannot be thrown upon their servants but must rest upon themselves. But the cases of passengers and strangers are by no means analogous. There is, for instance, no implied permission to a stranger to walk upon a railway track, because the road-master does not drive him off, as he doubtless might, if he chose. But having no responsibility in the matter, he is not obliged to do so; and no implied assent is the result of his omission to do so. But in the case of passengers it is different. They are, for the time, under the control of the conductors, and their duty is to put them in a safe place, and keep them there. And if they offer to violate the rules of the company, by riding upon the platforms, or in the baggage car, or in any other mode out of the ordinary and safe course, it is the right and the duty of the conductors to forbid them, in the most peremptory manner, and if they persist in their course, to compel them to desist by force, if need be. And if the conductors do not exercise their right and duty in these particulars, they must be regarded as having assented to the course pursued by the passenger, subject of course to the increased risk, thereby incurred, being borne by such passenger. And, subject to this qualification, the act of the conductor, upon a regular passenger train, must be regarded as binding the company to an assent to carrying the passenger in that mode. And the same would be true, probably, if some foolhardy passenger (of which there are multitudes all over the country, especially during the summer excursions, in search of new adventures), should insist upon standing upon his head, or lying his full length upon the platform of the cars during the entire passage. The company must be regarded as bound by the act of the conductor, if he did not forcibly prevent it, at least to the extent of stipulating to carry the passengers in that mode, as safely as it was practicable to do in that peculiar mode of transportation. If the passenger was damaged in consequence of his foolhardiness, in persisting in riding in that particular mode, he could not recover of course. But if he could show that his peculiar mode of riding did not contribute to his injury, but that it resulted *wholly* from the negligence of the company, he might unquestionably still recover.

But as we understand the settled law

upon the subject, in regard to passenger transportation upon freight trains, the rule of implication, as against the companies, resulting from the acts, declarations, and acquiescence of the conductors, is entirely different, we might say the reverse, from what it is upon passenger trains. Upon the freight trains of a railway company the conductors have no implied authority to bind the company by allowing persons to be carried as passengers. Every one is presumed to have notice, that railways do not carry passengers upon their ordinary freight trains, and that if one is allowed to pass upon them as a passenger, it is conceded as a favor and subject to the implied condition, that they will incur the additional risk and inconvenience necessarily incident to that mode of transportation. This rule has been often declared and is recognised in the principal case as well as in many others: *Murch* v. *Concord Railway*, 29 N. H. 9, where the question is discussed and very fairly presented by Mr. Justice BELL.

"The stage proprietor is a carrier of passengers by his coaches, but he does not thereby become a common carrier of passengers by his baggage wagons, if he carries on that business at the same time. Both the companies and the individuals, in these cases, are bound to their customers by the same duties relative to their freight trains and baggage wagons, and have the same rights as to the roads over which they travel, as if they had no connection with the business of common carriers of passengers." * * * "The first question which arises upon the point is, whether the railroad companies have made themselves common carriers of passengers by the freight trains * * * ?" "It is very clear that a wagoner, who occasionally carries a passenger upon his wagons as a matter of special accommodation and agreement, does not thereby become a common carrier of passengers. He only becomes such when the carrying of passengers becomes an habitual business. * * * Upon the evidence stated in the case that 'both roads had been in the habit of *occasionally* transporting some passengers upon the freight trains, when they were anxious to go,' we think we should not be justified in saying that they were common carriers of passengers upon their freight trains: *Elken* v. *B. & M.*, 3 Foster 275."

It seems to us that this presents the question in its true light, and we should seriously question, whether a conductor of a freight train can fairly be said to have any authority to bind the company, by accepting passengers upon his freight trains. It seems to us that justice to the companies requires, that any one who rides upon a freight train should be required to show permission to do so from the superintendent of the road, just as much as if he were riding upon the engine, in order to show himself rightfully upon the train. The conductor of a freight train has no more right to accept passengers for transportation, than has the baggage-master or the engineer upon a passenger train, to allow passengers to ride with them in their departments. We have always maintained the necessity of holding railways to the strictest responsibility in regard to passenger transportation. But we should, at the same time, require passengers to submit obediently to all the just requirements of the companies, and if they needlessly and understandingly departed from them, to accept the consequences in patient submission. If railway companies run passenger cars upon their freight trains, or in any other mode invite passengers to accept passage upon them, the company are bound to the same degree of responsibility as if they carried them in regular passenger trains. But where this is only occasional and for the accommodation

of the passenger, the rule of construction should be, we think, in favor of the company and the passenger be required to show clearly that he rode in that mode by the consent of the proper agent of the company, which in this case, it seems to us, the conductor of the freight train was not; but we urge this view with hesitation against so high authority.

I. F. R.

Supreme Court of Errors of Connecticut.

JULIUS TYLER AND ANOTHER *v.* ALFRED TODD.

In a suit against the defendant as endorser of a promissory note, the question being whether the endorsement was genuine or forged, and the defendant claiming that his name had been forged to a large number of notes of the same maker, and that this was one of them, the plaintiffs introduced a witness who testified that he received the note from the maker and sold it to one E., from whom it appeared that the plaintiffs received it. *Held*, that on cross-examination he might be inquired of as to having purchased other notes with the defendant's name endorsed thereon, such evidence tending to show that the witness might be mistaken in relation to the particular note by confounding it with some of the others.

The defendant testified in his own behalf that he had received forty-eight notices of protest as endorser of notes of the same maker from banks within a few months, and stated the amounts of the notes. *Held*, that this evidence was admissible in connection with his previous testimony that he had endorsed but one of the notes protested, as tending to prove that there was a large number of forgeries, a fact material to be shown in order to establish an alleged confederacy between the maker of the notes and certain other parties.

Questions of this character, involving a great variety of transactions with the accompanying circumstances, often require the testimony to take a wide range.

Where it does not appear clearly on what ground testimony objected to was admitted, and it was admissible for any purpose, the court cannot regard it as having been admitted for an improper purpose.

Where an objectionable question was asked and was permitted on objection by an auditor, but the witness in his answer stated only a fact that was admissible in evidence, it was held that the impropriety of the question was not a sufficient reason for setting aside the auditor's report.

Where the same question was repeated and the witness answered it in a manner that was in itself inadmissible, but the counsel at once disclaimed it as evidence, it was held that the impropriety of the question and answer was not a sufficient reason for setting aside the auditor's report.

Where a witness was introduced as an expert in judging of the genuineness of signatures, it was held to be proper for the party calling him to inquire of him as to his residence, his occupation, and the length of time he had been engaged in business that would qualify him to judge of signatures, and also to his actual experience in such matters as a witness in court.

Upon the question whether a signature is genuine or forged it is the practice in

this state to allow the disputed signature to be compared in court with others that are genuine.

But for this purpose they must not only be genuine, but must be admitted or proved to be such before they can be used, and a signature of which the genuineness is not thus established cannot be used even in a cross-examination of a witness to test his accuracy as to another signature.

An expert ought not to be permitted to give an opinion as to the genuineness of a signature upon a comparison of signatures not before the court.

Where an expert testified as to his opinion from a comparison of signatures made out of court, it was held that the opposing party had a right to object to the evidence, but, not taking that objection, had no right to require the production of the signatures so examined.

The defendant had testified that he had endorsed but nine notes signed by P., and that there were forty-seven notes made by P. upon which his name had been forged as an endorser. To contradict the defendant evidence was offered by the plaintiffs that six notes of P. had been shown to the defendant, purporting to be endorsed by him, and that he had not repudiated them. Held that this evidence was not admissible, unless it were shown that these notes were a part of the forty-seven which he disputed, and not a part of the nine which he admitted.

A witness cannot be inquired of on cross-examination as to irrelevant matters for the mere purpose of contradicting him.

ASSUMPSIT against the defendant as an endorser of a promissory note; brought to the Superior Court in New Haven county and referred to an auditor. The plea was the general issue, with notice that the defendant denied the genuineness of the endorsement of his name upon the note. The auditor found the issue for the defendant, and the plaintiffs remonstrated against the acceptance of the report. The Superior Court found the facts upon the remonstrance, and reserved the questions arising thereon for the advice of this court. The case is sufficiently stated in the opinion.

Doolittle, with whom was *C. Ives*, for the plaintiffs.

Baldwin, for the defendant.

CARPENTER, J.—The question before the auditor was, whether the name of Alfred Todd on the back of the note in suit was a genuine or false signature. It was claimed that his name had been forged to a large number of notes, amounting in the aggregate to a large sum, and that this was one of the forged notes. The auditor found the issue for the defendant, and the plaintiffs remonstrated against the acceptance of the report. The questions raised on the remonstrance will be considered in their order.

1. Francis Warner, a witness introduced by the plaintiffs, testified in chief that he received the note in suit from Richard Platt, the maker, that he sold it to Eneas Warner, from whom it was found that the plaintiffs received it, and that it was signed by R. Platt. All the questions put in the cross-examination, which are objected to, relate to the purchase of other notes from the same maker, many of which had the name of the defendant endorsed thereon. We do not see why that was not a legitimate cross-examination. It might tend to show that the witness was mistaken in relation to the matter testified to by him in chief, by showing that he had confounded this note with some one of the many other notes. If so, the auditor was clearly right in receiving the evidence.

2. The defendant was asked how many notices of protests of R. Platt's notes from banks he had received in the last few months. He replied, "forty-eight;" and stated the amounts of the notes, &c. This testimony, by itself, was not important; but, in connection with the fact previously sworn to, that he had signed but one of the notes protested, tended to prove, if the witness was believed, that there were a large number of forgeries outstanding, a fact material to be shown in order to establish the alleged confederacy between Platt, Warner and Smith. And we think also that it was relevant to the main issue. Questions of this character, involving as they do a great variety of transactions with the accompanying circumstances, often require the testimony to take a wide range. This was evidently one of those cases, and the testimony was properly admitted.

3. The case does not state clearly on what ground the testimony relating to the Goodsell note was received, or for what purpose it was used. The defendant now claims that Platt was a reluctant witness, that he had reason to suppose that he would testify to the combination, as he had previously, as it is claimed, testified in effect to the same thing in an affidavit, and that the questions put were designed and adapted to elicit such testimony. If that was all there was to it, we think it was within the discretionary power of the court to permit the questions to be put. If the testimony was limited to that the plaintiffs have no cause of complaint. Inasmuch as it does not appear for what purpose it was received and used, and we can see that for one purpose it might have been legitimately received, although for other purposes it might be

inadmissible, we cannot say, as matter of law, that it was received for an illegitimate purpose.

4. The question put by the defendant to the same witness, "Do you know of anything which causes you to believe that Henry F. Smith wrote the name of Alfred Todd on any note or notes signed by you during the summer or fall of 1868?" was objectionable, in form and substance, and should not have been permitted. But the fact sworn to in response, that there were more notes out than he could account for, was admissible. The answer being proper and admissible, we do not think the impropriety of the question a sufficient reason for setting aside the report. The second answer, in response to a repetition of the question, was clearly inadmissible, and would have been a sufficient reason for setting aside the report, had not the defendant's counsel, in the time of it, disclaimed it as evidence. If the case had been on trial to a jury, it might be questionable whether the evidence would not have some effect notwithstanding the disclaimer, but with a court accustomed to try causes and to distinguish between the legitimate and illegitimate effect of evidence, we cannot believe that any injustice was done.

5. The principal matter sworn to by William Hull was material to the issue and not objected to by the plaintiffs. The fact that was objected to was introductory merely, and only important as being a part of the transaction. As such it was clearly admissible.

6. We see no objection to the testimony of Paine. He was introduced as an expert. As a preliminary fact it was necessary to show that he was one. For that purpose it was proper to inquire of him as to his residence, his occupation, and the length of time he had been engaged in business that would qualify him to judge of handwriting. We also think it was proper to show that he had had actual experience in such matters as a witness.

Moreover it tended to show the estimation in which he was held by those who knew him best, and was admissible upon the same principle that we sometimes allow a party in the first instance to show that a stranger witness sustains a good character for truth and veracity at home: *Merriam* v. *Hartford & N. Haven R. R. Co.*, 20 Conn. 354; *Rogers* v. *Moore*, 10 Conn. 13.

7. The rule prevailing in England, and some of the states, excludes a comparison of handwriting in cases of this character.

But in this state we allow the disputed signature to be compared with signatures admitted or proved to be genuine. The triers may compare and judge for themselves, and experts may, upon comparison, give their opinions. But the signature used as a standard of comparison must not only be genuine, but must be admitted or proved to be such before it can be used. No case has come to our knowledge in which the signature written by another party, or a disputed signature, has been used for any such purpose. While we do not question the propriety of the rule adopted in this state, we are not disposed to extend it so as to embrace false or disputed signatures. This limitation of the rule is necessary in order to avoid confusion and collateral issues. And we think the same rule with the same limitation should apply to cases where the object is, as in this case, to test the accuracy of an expert. The same evils result from the introduction of such testimony, whether introduced for one purpose or the other. The law in Massachusetts in respect to a comparison of handwriting is similar to our own. The Supreme Court of that state, in *Bacon* v. *Williams*, 13 Gray 525, held that a disputed signature could not be used in cross-examination of a witness to test his accuracy as to another signature.

We think therefore that the auditor did right in refusing to allow the signature written by the plaintiffs' counsel to be used in the cross-examination of the witness.

8. The question relating to the testimony of Mr. Bristol seems to be this. He at first testified in behalf of the plaintiffs that he believed the signature to be genuine. Subsequently, at the instance of the defendant, he testified that he had again examined the signature, and was of the impression that it was counterfeit. On a cross-examination by the plaintiffs it appeared that the change in his opinion was in part the result of a comparison with other signatures, not before the court, some of which were said to be genuine and others not. The plaintiffs then insisted that those signatures should be produced; but the auditor overruled this claim. We agree with the plaintiffs' counsel that an expert should not be permitted to give an opinion formed upon a comparison with signatures not before the court. Hence if the testimony had been objected to when the fact appeared, it would have been the duty of the court to exclude it, unless under the circumstances it was admissible as affecting his previous testimony. But

if admissible at all for any purpose, its force as an opinion must have been materially weakened, if not entirely destroyed, by the matter elicited by the cross-examination. The plaintiffs took no exception to the testimony, but the presumption is that they had the benefit of having it weighed in connection with the facts. In one or the other of these ways the plaintiffs had their remedy; but we do not think they had a right to demand the production of the signatures, and thus cumber the case with a multiplicity of collateral issues. But if we are wrong in this, there is another view of the question which is conclusive against the plaintiffs. The question calls for the genuine and false signatures alike. If upon any principle they were entitled to the former, they clearly were not entitled to the latter. If a party group together admissible and inadmissible testimony, and insists upon the admission of the whole, the court is not bound to make the distinction, but may reject the whole together.

9. Before the testimony, offered by the plaintiffs, that six notes were shown the defendant in the month of August 1868, and not repudiated by him, as referred to in the 9th reason of the remonstrance, could have any effect by way of contradicting the defendant, who had testified that he had endorsed but nine notes, signed by R. Platt, after the preceding April, it was necessary to show that said notes were not a part of the nine, but were in fact a part of the forty-eight, claimed to be forgeries. As that did not appear, and the testimony offered was unaccompanied with any offer to make such proof, we think the auditor did right in excluding it.

10. The plaintiffs, in the cross-examination of Joseph R. Platt, elicited matters which had no relation to the matters testified to by the witness in chief.

To lay the foundation for contradicting him, the question stated in the remonstrance was put to him, but the auditor excluded the question, and rejected the evidence. It is not pretended that the note, referred to in the question, had any relation to the note in suit. It was irrelevant matter, and the rule is too well settled to require argument, that a witness cannot be inquired of respecting such matters, for the mere purpose of contradicting him.

On the whole, we advise the Superior Court to accept the

auditor's report, and render judgment thereon for the defendant.

In this opinion the other judges concurred, except HINMAN, C. J., who did not sit.

The foregoing case can scarcely fail to interest the profession, from the great number of practical questions involved in it.

1. The range of cross-examination. It does not always seem to be remembered by courts, that if cross-examination is to be allowed as a test of the intelligence and fairness of the witness, it becomes indispensable to these ends, that it should be left to a great extent to the discretion of the examining counsel, both as to the mode adopted and the range pursued. And the minds of counsel seem, sometimes, equally oblivious of the fact, that in conducting such cross-examination, they are placed, to a considerable degree, upon their professional honor. The very discussion of the limits of cross-examination, in the presence of the witness, at once puts him upon his guard, and thus defeats most of its beneficial effects. There seems to be, in the popular mind, a kind of admiration of coarseness and impudence on the part of examining counsel; and the counsel, too often it may be feared, aspiring to no higher merit than popular admiration, lend themselves to an abuse of professional privilege, in treating a witness as a kind of volunteer combatant, defying all impeachment. There could be no greater misapprehensions. The witness is a portion of the court, so to speak, brought there by compulsion, and altogether indispensable to the ends of justice, and as much under the shield and protection of the court, as the counsel are. It therefore greatly becomes counsel to consult their own self-respect, in framing their questions, and not to forget that in browbeating a witness, they insult the court and bring discredit both upon themselves and their client.

And on the other hand, counsel who are conscious of having a good cause and honorable witnesses, will not be over sensitive in regard to the reasonable allowance of cross-examination. The most absurd and the most damaging course to his own side, is the course not unfrequently pursued by counsel of cross-examining his adversary's witnesses upon every point of their testimony, from beginning to end, thus compelling the witnesses to reaffirm every point of their testimony, in the minutest detail, and thus supplying any defects which may have occurred in putting in the testimony. It is certain that in the great majority of cases, the adversary's case is fortified by the cross-examination of his witnesses, and in not a few, a defective case is supplemented and made out, whereas, if left upon the examination in chief, the party must have failed. This may look like exaggeration, but we feel sure it is not.

2. In regard to the comparison of a disputed signature with those which are genuine, it must be remembered, that the fact of its genuineness must be shown beyond all question, either by the admission of the party, or by the testimony of some one who saw the author make, or admit the genuineness of the signature used for comparison. Unless this were so the experts and the jury might be comparing two fabricated signatures with each other. The English rule restricts comparison of handwriting to documents already in the case for some legitimate purpose connected with it; and does not allow the resort to merely spe-

culative comparisons; and it must be confessed there are some cogent reasons against such a course. It enables the parties to select signatures suited to their ends rather than those of truth and justice: 1 Greenl. Ev. §§ 578 *et seq.*, *Doe* v. *Suckermore*, 5 Ad. & Ellis 703, 731, and other cases cited by Mr. Greenleaf.

I. F. R.

Supreme Court of Errors of Connecticut.

LINCOLN *v.* McCLATCHIE.

The defendant in the month of March put into the hands of the plaintiff, a real-estate broker, for sale, a house in a certain city street, at the price of $6500; the plaintiff to receive a commission of 1 per cent. if he sold the house, the defendant to have the right to sell it himself without being liable to a commission, and the plaintiff not to advertise. The plaintiff entered the house on his books, and in December and January following advertised houses for sale on that street. G., who lived on the street and was desirous of finding a house near by for a friend, saw the advertisement and went to the plaintiff's office and learned that the defendant's house was for sale. He informed his friend, and the latter went to the defendant and negotiated with him for it and finally purchased it. The purchaser did not see the plaintiff nor go to his office, and G.'s action in the matter was wholly voluntary: *Held* that the plaintiff was entitled to his commission.

A sale made by the defendant, upon which the plaintiff was to have no commission, held to mean a sale to a purchaser found by the defendant wholly without the plaintiff's procurement.

The plaintiff, by some misunderstanding, had altered the entry of the price on his books from $6500 to $6000, and gave the latter price to G. when he inquired. The defendant's price remained $6500, and he sold the house for $6400: *Held* that the plaintiff was still entitled to his commission.

ASSUMPSIT, to recover a commission for the sale of real estate, claimed to be due to the plaintiff as a real-estate broker; brought to the Superior Court in Hartford county. The following facts were found by an auditor to whom the case was referred:

On the 14th of March 1866, the defendant left with the plaintiff, a real-estate broker in the city of Hartford, upon sale, a certain piece of real estate, with house and buildings, upon Canton street, in Hartford. The plaintiff was instructed not to advertise the place, but was to sell it at private sale for $6500, and in case of such sale he was to receive 1 per cent. as a commission. The defendant was to have the right to sell it himself, and in that case the broker was to have no commission or pay. The plaintiff entered a description of the place, with particulars of price, &c., in his descriptive-book, kept in his office for consul-

tation by his customers. Subsequently the plaintiff reduced the price upon his descriptive-book to $6000, supposing that he had the defendant's consent, which the latter had not in fact given him.

In December 1866, and in January 1867, the plaintiff advertised houses upon Canton street for sale. One Goodwin resided upon Canton street, and had been looking for a house suitable for a friend of his named Burdick. He also took an interest in real-estate matters generally, particularly in his neighborhood. He was attracted by the advertisement to the plaintiff's office, where he learned from the plaintiff that the defendant's house was for sale. The plaintiff gave him $6000 as the price. Goodwin subsequently informed Burdick that McClatchie's house was for sale at $6000. Burdick asked him to look at it and report to him. He did so, and advised Burdick to buy. Burdick then examined the house himself, and soon after entered into negotiation with the defendant personally, which resulted in the defendant's selling to Burdick the place (with a few articles of personal property worth less than $100), for $6500, on the 18th of February 1867. Burdick had no personal intercourse or dealing with the plaintiff. Goodwin's connection with the plaintiff in the matter was voluntary. Goodwin informed Burdick before he purchased that the house was in the plaintiff's hands for sale at $6000.

If upon the foregoing facts the court should be of opinion that the defendant was not legally liable to the plaintiff, the auditor found the defendant not indebted; but if the court should be of opinion that upon the facts the defendant was liable, then the auditor found the defendant indebted to the plaintiff in the sum of $64, with interest from February 18th 1867.

The Superior Court rendered judgment for the defendant, and the plaintiff brought the record before this court by a motion in error.

Hyde and *Jones*, for the plaintiff.

Cole, for the defendant.

PARK, J.—If Burdick, the purchaser, had gone to the office of the plaintiff to ascertain what real estate there was for sale and there obtained all the information that was communicated to

Goodwin, and in consequence thereof had opened a negotiation with the defendant to purchase and had finally purchased the premises, the counsel for the defendant concede that he would have been liable: *Murray* v. *Currie*, 7 Car. & P. 584; *Wilkinson* v. *Martin*, 8 Id. 1; *Burnett* v. *Bouch*, 9 Id. 620.

But the claim is, that the fact that the information that Burdick received was communicated to him by Goodwin, who received it from the plaintiff while he was not acting as the agent of Burdick in procuring it, materially alters the character of the transaction, and renders the defendant not liable to the plaintiff.

It appears that Goodwin was the personal friend of Burdick, and knew that the latter wished to purchase a dwelling-house. His friendship prompted him to search for a suitable place for his friend that was for sale. He saw an advertisement of the plaintiff of houses for sale upon Canton street, and went to his office for information about them. He there learned that the defendant had a house for sale, and was told the price. This information he communicated to Burdick, and informed him that the house was in the plaintiff's hands for sale. Burdick thereupon requested Goodwin to examine the premises and report to him. Goodwin did so, and advised Burdick to purchase. Burdick then examined the house himself, and soon after entered into negotiation with the defendant to purchase, which resulted in a sale.

Had Burdick in the first instance requested Goodwin to do what was done by him in this transaction, the case would have stood precisely as if Burdick had procured the information himself from the plaintiff, on the principle *qui facit per alium facit per se*, and the defendant in that case would clearly have been liable. Is the case materially different? Goodwin acted for Burdick in procuring the information. He did not casually obtain it, but went to the office of the plaintiff to ascertain what intelligence he had to disclose. Burdick acted upon the information when communicated to him by Goodwin, knowing from what source it had been obtained. He adopted the acts of Goodwin, which was equivalent to a previous request to perform the acts. The plaintiff was pursuing the business of a broker in giving the information, and Goodwin received it for Burdick in the capacity of a messenger and conveyed it to him. Suppose Goodwin had informed the plaintiff for what purpose he inquired, and the

information had been given for the purpose of being communicated to Burdick, would the case for the plaintiff have been stronger? The information was given in order to procure a purchaser, and can the fact that Goodwin did not make known for whom he was acting make any material difference, when his act operated directly to bring the buyer and seller together? They show that the plaintiff was the procuring cause of the sale, as much as would have been the case if Goodwin had made known his business, or Burdick had gone in person to the office of the plaintiff and obtained the information himself.

The defendant further claims that he specially reserved the right to sell the property himself, without being liable to pay a commission to the plaintiff. We think the proper construction of the understanding was, that the defendant should have the right to sell to a purchaser found by him independently of the plaintiff's procurement.

For these reasons we think there is manifest error in the judgment complained of.

In this opinion the other judges concurred.

The foregoing opinion seems to us extremely valuable by reason of its handling of a very common and sometimes perplexing question in a very just and common-sense manner. There seem, as we might naturally expect perhaps, to be two extreme views in regard to commissions being due brokers, agents, or factors, for the sale of commodities, and especially of real estate. We mean now, of course, in those cases where no special contract or custom exists, which might control the same.

1. It seems by those in the interest of the brokers, to be supposed in the absence of all special customs or contracts, that, where a broker is employed to negotiate a sale, for which he is to receive a specified or customary commission, that the commissions are earned the moment the property is committed to the broker for sale, and that the owner can have no control over the property thereafter, either to withdraw it or to make sale of it himself, without first paying the broker his commission, certainly not unless he specially reserves such right.

2. Those in the interest of the vendors seem to suppose the broker has no right to any kind of recompense for all he may do or pay, by way of inviting or negotiating a sale, unless he actually consummates it.

The truth seems to lie between these extremes, and in the precise line indicated in the opinion. The broker may pursue his own mode in finding a purchaser; and there is, probably, an implied understanding, that if the vendor shall withdraw his property or effect a sale solely on his own account, he may do so, but in that event he may be bound to reimburse any expense the broker may have incurred by advertising or otherwise. But unless he contributed to the sale made by the owner of the property he is not entitled to commis-

sions. Commissions, *eo nomine*, can only be earned by a complete sale; the same as freight is the mother of wages, and the completing of the voyage, under ordinary circumstances, is required in order to demand freight.

But if the efforts of the broker in fact procure the purchaser, even where the bargain is made with the owner, and without his knowing of the fact that the action of the broker procured the purchaser, nevertheless, upon that fact being disclosed, nothing can be more reasonable or just than that the broker should receive commissions: *Durkee* v. *Vermont Central Railway*, 29 Vt. 127. But if the broker find a purchaser at the price required and the owner refuse to sell, the broker will be entitled to claim full commissions: *Kock* v. *Emmerling*, 22 How. U. S. 69; *Bailey* v. *Chapman*, 41 Mo. 536. So also where the sale fails through defect of title: *Doty* v. *Miller*, 43 Barb. 529; *Topping* v. *Healey*, 3 F. & F. 325.

I. F. R.

Circuit Court of the United States, Southern District of Georgia.

HARVEY W. LATHROP *v.* DAVID M. BROWN.

A state statute providing that in all suits founded on any debt or contract made prior to 1865 or in renewal thereof, the plaintiff should not have a verdict or judgment until he had made it clear to the tribunal trying the same, that all legal taxes chargeable by law upon the same had been duly paid for each year since the making of the debt or contract; and that the giving in of the debt for taxation and payment of the taxes should be a condition precedent to a recovery, is unconstitutional, as far at least as regards debts or contracts made before its passage.

On demurrer. The facts are stated in the opinion.

Harden & Levy, for plaintiff.

A. W. Stone, for defendant.

Bradley, J.—This is an action brought by Harvey W. Lathrop, a citizen of Maryland, against David M. Brown, upon a promissory note dated January 1st 1862, whereby one Jacob L. Riley, as principal, and Brown as surety, promised by the 1st of January, then next, to pay John J. McLeod, or bearer, $2280.50 for value received. Two thousand dollars were paid on the note December 8th 1865. The suit is brought for the balance. The defendant, amongst other things, pleads that the contract was made prior to 1st of June 1865, and that by a statute of Georgia of 13th of October 1870, it was enacted that in all suits brought in or before any court of the state founded on any debt or contract made before the 1st of June 1865, or in renewal thereof, it should

not be lawful for the plaintiff to have a verdict or judgment in his favor until he had made it clear to the tribunal trying the same, that all legal taxes chargeable by law upon the same had been duly paid for each year since the making of said debt or contract. And further: In every trial upon a suit founded upon any such contract, it is provided that said debt has been legally given in for taxes and the taxes paid shall be a condition precedent to a recovery on the same; and in every such case, if the tribunal trying is not clearly satisfied that said taxes have been duly given in and paid, it shall so find; and said suit shall be dismissed; and defendant avers that the causes of action in the declaration mentioned were chargeable with taxes, which have not been given in or paid.

The plaintiff demurs to this plea. The question is, whether said statute is constitutional, and I am clearly of opinion that it is not. It imposes upon the plaintiff conditions for a recovery which were not required to be performed when the contract was made—conditions onerous, and if he has not paid the taxes, impossible to be performed. It imposes a penalty and forfeiture for non-payment of taxes, which it is conceded did not exist when the taxes were assessed and payable. It therefore not only impairs the validity of a contract, but is an *ex post facto* law. Restrictions on the remedy which materially affect a contract tend as much to impair its validity as laws passed to abrogate it. They differ only in degree. I have no hesitation or doubt on the subject.

Judgment for plaintiff.

The foregoing decision possesses a peculiar interest at the present time, and especially as the same question as to the constitutionality of the statute of October 13th 1870, is now pending before the Supreme Court of the state of Georgia.

On the 11th March 1868, the "Georgia Constitutional Convention" ordained and adopted a constitution, the 3d subdivision of section 17, article 5, of which reads as follows: "It shall be in the power of the General Assembly to assess and collect upon all debts, judgments, or causes of action when due, founded on any contract made or implied before the 1st day of June 1865, in the hands of any one in his own right, or as trustee, agent, or attorney of another on or after the 1st day of January 1868, a tax of not exceeding 25 per cent. to be paid by the creditor on pain of the forfeiture of the debt, but chargeable by him as to one-half thereof against the debtor, and collectable with the debt. *Provided*, that this tax shall not be collected if the debt or cause of action be abandoned or settled without legal process, or, if in judgment, be settled without levy and sale." — By an Act

of Congress passed on the 25th of June 1868 to admit the states of North Carolina, South Carolina, Georgia, and other states to representation in Congress, it is declared among other things "that the 3d subdivision of the 17th section of article 5 of the Constitution of Georgia," as above quoted, "shall be null and void, and that the General Assembly of said state by solemn public act shall declare the assent of the state to the foregoing fundamental condition." Public Laws U. S. 1867–8. On the 21st July 1868, the legislature of Georgia accepted and assented to the said condition, leaving out the parts declared null and void by Congress.

On the 13th October 1870, the same legislature passed an act "to extend the lien of set-off and recoupment as against debts contracted before the 1st June 1865, and to deny to such debts the aid of the courts until the taxes thereon have been paid;" which is the statute pleaded in the above case. To this statute there are sixteen sections, but it is not necessary to refer particularly to any others than those quoted by the learned judge in his opinion. A general demurrer to this plea brought up the question of the constitutionality of the statute.

Judge BRADLEY has decided that the act is unconsfitutional. "It not only," remarks the judge, "impairs the validity of a contract, but is an *ex post facto* law. Restrictions on the *remedy* which materially affect a contract tend as much to impair its validity as laws passed to abrogate it. *They differ only in degree.*" Such has been the ruling of the Supreme Court of the United States in a series of decisions from *Bronson* v. *Kinzie*, 1 How. 315, decided in 1843, to *Butz* v. *Muscatine*, decided in 1869, 8 Wall. 575. In the first case the court say: "Whatever belongs *merely to the remedy* may be altered according to the will of the state, *provided the alteration does not impair the obligation of the contract.* But if that effect is produced, it is immaterial whether it is done by acting on the *remedy* or directly on the contract itself. In either case it is prohibited by the Constitution." In *Van Hoffman* v. *City of Quincy*, 4 Wall. 535, the court say: "No attempt has been made to fix definitely the line between alterations of the *remedy*, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. * * * If these doctrines were *res integræ* the consistency and soundness of the reasoning which maintains a distinction between the contract and the remedy—or, to speak more accurately, between the remedy and the other parts of the contract—might perhaps well be doubted. *But they rest in this court upon a foundation of authority, too firm to be shaken.* * * * The doctrine upon the subject established by the latest adjudications of this court render the distinction one rather of form than substance." In *Butz* v. *City of Muscatine*, 8 Wall. 575, the court held "that a *remedy* which the statutes of a state give for the enforcement of contracts cannot be taken away, as respects previously existing contracts, by judicial decisions of the state courts construing the statutes wrongly. * * * It has been uniformly held by this court that such *remedies* are within the protection of the Constitution of the United States, and that any state law which substantially impairs them is as much prohibited by that instrument as legislation which otherwise impairs the obligation of the contract. This subject was fully considered in *Van Hoffman* v. *City of Quincy*, 4 Wall. 557."

The constitutionality of this statute of Oct. 1870, is now before the Supreme Court of Georgia; and from recent decisions delivered by that court, we are constrained to believe that the statute will be held to be constitutional. In

1868, this court held "that the provision of the Constitution of the United States, which denies to a state the right to pass any law impairing the obligation of contracts, does not interfere with the right of a state to pass *laws acting upon the remedy:*" *Cutts & Johnson* v. *Hardee*, 38 Ga. 350; WARNER, J., dissenting. This decision was delivered upon the question as to the constitutionality of the Relief-Law, passed in 1868. In 1869, the Constitutionality of the Homestead and Exemption Laws was before the court, and the court held that "homestead and exemption laws, though retroactive, do not fall within the prohibition of article 10, sec. 1st of the Constitution of the United States, declaring that no state shall pass any law impairing the obligation of a contract;" and "that the Constitution of the United States does not prohibit a state from divesting a vested right, except when that right is vested by virtue of, and under a contract of the parties." WARNER, J., dissenting: *Hardeman* v. *Downer*, 39 Ga. 425. If this court could decide the Relief-Law of 1868 and the Homestead and Exemption Laws of 1869 constitutional, it will have no trouble in deciding the Statute of 1870 constitutional, and for the third time publicly disregard the adjudications of the Supreme Court of the United States which "rest upon a foundation of authority, too firm to be shaken."

J. H. T.

United States Circuit Court, Northern District of Georgia.

JEFFERSON C. FRENCH *v.* LEWIS TUMLIN.

Judgments of the courts of Georgia during the war are valid judgments so far as relates to parties within their jurisdiction.

A judgment of a court of Georgia, in November 1861, for the purchase-money of slaves, was a valid judgment when entered, and may be enforced now.

The provisions of the Constitution of Georgia that "no court shall have jurisdiction to enforce any debt the consideration of which was a slave or the hire thereof," so far as it relates to contracts valid when made, is repugnant to the Constitution of the United States, and void.

THIS was an action of debt on a bond conditioned for the payment of a judgment obtained by one Chisolm (whose assignee plaintiff was) in the Inferior Court of Cass (now Bartow) county, November 25th 1861, but stipulating that "if the State Convention, to be held in December 1867, or any state legislature, shall pass any resolution, ordinance, act, or law that shall relieve defendant from his constitutional and legal liability to pay said judgment, or any part thereof, then defendant is to be relieved and discharged from complying with said obligation in the same way and manner, and to the same extent, that he is relieved and discharged from the payment of the judgment," &c.

Defendant pleaded among other things that there was no consideration for the bond, because the judgment therein mentioned was utterly void, being rendered while the sovereign authority of the state was displaced and its constitutional government overthrown, and whilst its functions were usurped by a spurious and revolutionary government; and that said judgment was rendered by and under said spurious and revolutionary government, and was for the price and purchase-money of slaves, and for no other cause; that plaintiff took said bond with notice of these facts, and that he paid no value for the same, &c.

To this plea there was a replication and to the replication a special demurrer, but these are not necessary to notice in the view taken by the court.

Akin, Hammond & Son, and *Dougherty*, for plaintiff.

Bleckley, for defendant.

ERSKINE, D. J.—The obvious intention of the plea is to show that there was no consideration for the making of the bond; and, under the code, want of consideration is a good defence. The object and design of the other matters stated in the plea are, that the judgment is a nullity, because it was rendered in this state whilst the rightful government was overthrown, and its place usurped by a spurious authority; but if not void for that reason, then it was void because it was rendered upon an undertaking which cannot be recognised or enforced in this court, the price and purchase-money of slaves. The other branches of the plea may be passed over for the present. It is to the substantial elements alone of the plea that the court must look in giving judgment.

There is nothing indicated in the plea going to show that the defendants, or either of them, in the action brought by Chisolm in the Inferior Court of Cass (Bartow) county, had no notice of the action, or that they questioned the jurisdiction and had their plea overruled, and had no further remedy, or that for good reasons they did not appear and defend. And I find nothing in the record before me which states, or from which it can be inferred, that defendants in that suit were not citizens of Georgia, and one or both of them resident of Cass county, when the proceedings were instituted.

Had the Inferior Court, pending the action in 1861, jurisdiction of the parties and subject-matter of the suit brought by Chisolm against Fields and Tumlin, and if so, was the judgment for the purchase-money of slaves valid? and if valid, then can this court recognise it now, and if necessary enforce it?

Neither of these inquiries is free from embarrassment. I learn that these or similar questions now stand for argument on error or appeal before the Supreme Court of the United States. And had they not risen here, during the progress of a trial at bar, I would have deferred judgment and awaited the decision of the Supreme Court. But as they are directly presented by the pleadings, I will pass upon them—not with hesitancy in the performance of a duty, yet not without diffidence in my ability to perform it well. I shall be as brief as possible in my remarks.

Looking to the first specific clause in the plea, that the judgment rendered on the 26th of November 1861 was void, for the reason that it was pronounced during the rebellion, I refer to the case *Cuyler* v. *Ferrill*, 8 Am. Law Reg. N. S. 100. A suit had been instituted in 1862 or 1863, by certain heirs, through guardians, in the so-called Superior Court of Chatham county, in this state, to partition land. One of these heirs was a citizen of Alabama, the other of Georgia; but Dr. Cuyler, another heir, was a citizen of Pennsylvania, and, at the time the suit was pending, a surgeon in the national army. He was notified, in accordance with the statutory laws of Georgia, by publication, to appear and defend. He did neither. The court ordered the property, as it could not be equitably devised, to be sold, and Cuyler's share of the proceeds invested in Confederate bonds, which was done. The other heirs received their moiety in Confederate treasury notes. After the war, Cuyler filed his bill against Ferrill, who had purchased the property, and the other heirs, to set aside the proceedings. And I decreed them to be, so far as they concerned Dr. Cuyler, utterly null and void, because that tribunal had no jurisdiction of him or his estate. But as to the position of those heirs who had voluntarily sought the aid of that court, I declined to express any opinion. Had it been a point absolutely necessary for decision, I apprehend that I would have been warranted in holding that they or their guardians (as the case might be) were by their own voluntary act estopped from denying the validity of the proceedings in the so-called Superior Court.

In 1868 the Supreme Court of the United States, in *The State of Texas* v. *White*, 7 Wall. 100, said: "It is not necessary to attempt any exact definition within which the acts of said state (Texas) government must be treated as valid or invalid. It may be said, perhaps, with sufficient accuracy, that acts necessary to peace and good order among citizens, such, for example, as acts * * * providing remedies for injuries to person and estate, and other similar acts which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual though unlawful government."

I think that the court meant to employ the term "remedies" in the ordinary legal and judicial sense, and did not intend to confine it to the redress of torts and injuries alone, but that it should also apply to the enforcement of contracts. I do not think that the judgment is void for the first special cause alleged in the plea.

The next fact stated in the plea is, that the judgment was for the price and purchase-money of slaves and for no other cause whatsoever. Is the judgment invalid for this reason? The opinions which I have always entertained on the subject of slavery —the buying and selling of human beings like sheep in the shambles—must be here laid out of view; for it is the duty of the judge to declare the law of the case before the court, and to forget, while discharging his official duties, his own private opinions. Time will not permit me to give a full exposition of my views on this question. Therefore, in brief, if the contract was for the price and purchase-money of slaves, and that contract was the immediate subject of the action upon which the judgment of the 25th of November 1861 was founded, the judgment, when rendered, was, in the opinion of this court, valid. But it is said that even if valid then it is not so now, or if valid now it cannot be recognised, or (if necessary) enforced by this court; and the first paragraph of section 17, article 5, of the state constitution of 1868 is referred to. It is as follows:—

"No court or officer shall have, nor shall the General Assembly give, jurisdiction or authority to try or give judgment on or enforce any debt, the consideration of which was a slave or slaves, or the hire thereof."

The word "judgment" is not in this paragraph, but it is necessarily included in the term "debt," a judgment being but a debt

of record—a chose in action—and in this state negotiable by endorsement or written assignment like bills or promissory notes; but the transferee takes it "subject to the same equities and defences as the original plaintiff in judgment was." This provision of the constitution has been before the Supreme Court of the state on more than one occasion. The leading case, however, is *Shorter* v. *Cobb et al.*, 39 Ga. 285. The opinion of the court (WARNER, J., dissenting) was delivered by Chief Justice BROWN. Shorter, as bearer, sued Cobb upon a promissory note made in 1861, and payable twelve months thereafter; the note was given for slaves, and the court below dismissed the action for want of jurisdiction, and the Supreme Court of Georgia affirmed the judgment.

I here remark that it was in accordance with certain Acts of Congress that the state convention was called. A constitution was framed and submitted to Congress, and certain portions of it were stricken out by Congress. But the provision which I have just read was allowed to remain. On this matter the Chief Justice in his opinion says: "But it is the constitution as amended and approved by the Congress of the United States, by virtue of their authority as the conquering power, to dictate a form of government to the conquered, which is accepted by the people of the state as an act of obedience to the conqueror, and not as a matter of will or sanction."

He afterwards says, "that Congress is presumed to have sanctioned every word and line of it which, upon examination, Congress did not, while amending it, require to be stricken out or changed." From these propositions the Chief Justice draws the following corollary: "The state has not pretended to destroy the obligation of this class of contracts. She has simply said, with the sanction of Congress in forming her new government, that her (the state's) courts shall have no jurisdiction to enforce them."

In *Luther* v. *Borden*, 7 How. 42, the court said that "it rests with Congress to decide what government is the established one in a state. For, as the United States guarantee to each state a republican government, Congress must necessarily decide what government is established in the state, before it can determine whether it is republican or not."

This question is wholly political, its determination belongs exclusively to Congress, and, therefore, it is in no wise judicial in

its nature. And it must not be forgotten that the executive, judicial, and legislative departments of the United States, though co-ordinate branches of the government of the nation, are, in their powers and functions, separate and distinct.

In rejecting certain provisions in the constitution of the state, or in allowing that relating to the inhibition placed upon the courts to take jurisdiction of debts, the consideration of which was a slave or the hire thereof, Congress did not, I apprehend, in any wise mean to interfere with the constitutional powers and functions of the judiciary department of the government, any more than the judiciary would assume to control the admission to Congress of senators or representatives. I cannot think otherwise than that Congress intended to leave the interpretation and construction of that provision in the state constitution exclusively and absolutely with the courts. This provision does not declare that contracts for the purchase of slaves shall be void, but that the courts shall not have jurisdiction or authority to enforce them. Does it, then, contravene any portion of the 10th section of the 1st Article of the Constitution of the United States, which declares that "no state shall pass any bill of attainder or *ex post facto* law, or law impairing the obligation of contracts?"

In the case of *Cohen* v. *Virginia*, 6 Wheat. 414, the court said, that "the constitution and laws of a state, so far as they are repugnant to the Constitution of the United States, are absolutely void." And in *Cummings* v. *The State of Missouri*, 4 Wall. 277, the court, Mr. Justice FIELD delivering the opinion, declared certain parts of the Constitution of the state of Missouri null and void, because they were in contravention of the 1st and 2d clause of this section.

I will now endeavor to ascertain and determine whether this provision in the state constitution impairs the obligation of contracts. For this purpose the case of *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, may be relied upon, containing, as it does, a clear and exact exposition of this most important subject.

Mr. Justice SWAYNE, in delivering the opinion of the court, said: "It is also settled that the laws which subsist at the time and place of the making of the contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to and incorporated in its terms. This prin-

ciple embraces alike those which affect its validity, construction, discharge, and enforcement.

"Without the remedy, the contract may indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the constitution against invasion.

"It is competent for the states to change the form of the remedy or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired."

Applying these citations to the provision in the state constitution now under consideration, it will become obvious that it is in direct conflict with the 10th section of the 1st article of the Constitution of the United States; indeed, it is not only an impairment of the obligation of the contract, but a denial of all remedies. And, in the language of Mr. Justice SWAYNE, "A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist:" *Von Hoffman* v. *City of Quincy*, 4 Wall. 554.

If contracts, entered into previously to the promulgation of the president's proclamation of emancipation, the consideration of which was the price and purchase-money of slaves, were then valid under the laws of the United States and of the state of Georgia, the aid of the courts must be given, if demanded, to enforce them. But if such contracts were invalid, the provision in the state constitution is mere surplusage.

There must be judgment *quod recuperet* on this plea.

I. The question in the foregoing case as to the right to enforce by suit a note given on the sale of slaves prior to emancipation, was thought to be involved in the case of *Generes* v. *Campbell* before the Supreme Court of the United States at its last session, and was argued there, but the report (11 Wall. 193) shows that the court took no notice of it, and decided the case upon other grounds.

The same question also arose in another case which was on the docket of the same court at the last term, and was argued, but no opinion has yet been delivered. There is therefore no decision on the subject by the Supreme Court of the United States.

II. In *McNealy* v. *Gregory*, in the Supreme Court of Florida (April Term 1871), a question arose similar to that in the foregoing case, viz.: the validity of the 26th Sec., Art. 16, of the State Constitution, prohibiting the bringing of any suits after January 10th 1861, on notes, bills, &c., given for the purchase of slaves, and the clause was held to be

unconstitutional, as destroying the obligation of a contract.

The section is as follows: "It shall be the duty of the courts to consider that there is a failure of consideration, and it shall be so held by the courts of this state upon all deeds or bills of sale given for slaves with covenant or warranty of title or soundness, or both, upon all bills, bonds, notes, or other evidences of indebtedness given for or in consideration of slaves which are now outstanding and unpaid; and no action shall be maintained thereon; and all judgments and decrees rendered in any of the courts of this state since the 10th day of January 1861 upon all deeds or bills of sale, or upon any bond, bill, or note, or other evidence of debt, based upon the sale or purchase of slaves, are hereby declared set aside, and the plea of failure of consideration shall be held a good defence in all actions to said suit; and when money was due previous to the 10th day of Jannary 1861, and slaves were given in consideration for such money, there shall be deemed a failure of consideration for the debt; *Provided*, That settlements and compromises of such transactions, made by the parties thereto, shall be respected."

On appeal from the Circuit Court of Calhoun County, dismissing a suit brought by Adam McNealy against Gregory on a promissory note given for the price of a slave purchased in March 1860—for want of jurisdiction to hear and determine the same, WESTCOTT, J., after a careful review of the entire subject, *held:*

1. The courts of this state derive their jurisdiction from the state constitution. They cannot assume jurisdiction not granted, or which is denied, although the effect may be that the obligation of a contract cannot be enforced. The jurisdiction of the courts is no part of the obligation of a contract.

2. The last clause of Sec. 26, Art. 16, of the Constitution, providing that "all judgments and decrees rendered in any of the courts of this state since January 10th 1861 upon all deeds or bills, &c., upon the purchase of slaves, are hereby declared set aside, &c.," is legislative, not judicial action: it prescribes a rule for the action of the courts in reference to a particular class of judgments upon their records; it is a law operating retrospectively upon the contract, and its effect is to make that which was a good consideration for a contract at the time and place it was entered into, not a good consideration; this is to destroy the obligation of the contract, and it is therefore void.

The abolition of slavery, or the emancipation of the slave, does not destroy the right of action which the vendor of the slave so emancipated has against the vendee, who owned the slave at the time of his emancipation, and any action of a convention of this character, which directs the courts to hold otherwise, is void, as it impairs the obligation of a contract.

3. If the purpose of the convention in this clause was to destroy all the right of the plaintiff in execution in this judgment, as a punishment for making this species of property the subject of sale, or for any other act, then viewed in this aspect, it becomes a bill of pains and penalties, and is void.

4. If it is regarded as the exercise of judicial power by the convention, the result of which is to set aside the judgment, then it is the exercise of a power by the delegate which had not been conferred, and the delegate possessed no inherent power of the character here exercised: nor could such an act become valid by receiving the sanction of a majority of votes of the people.

A citizen of the United States, in time of peace, has a right under the Constitution of the United States to have his rights to property made the subject of

adjudication and investigation by no other tribunal than one which is a part of a government which is republican in form, such as a Court of the United States, or of a state, where the judicial powers of government are confided to a recognised judicial department, controlled in its judgments by the law of the land; nor can the people, by a simple majority vote, give validity to the void act of a body of delegates which deprives the citizen of his property without due process of law.

III. In *Osborne* v. *Nicholson*, in the United States Circuit Court, for the Eastern District of Arkansas, the court, CALDWELL, J., reached a different conclusion upon the general question of the right to recover on such contracts. We regret that the opinion is too long for our pages, but give the abstract of the argument as stated by the court itself.

1. The institution of slavery under the Constitution of the United States, was purely local in its character, and confined to the several states where it existed, and was the creature of positive law, and this is true of all its incidents.

2. The Constitution of the United States did not regard slaves as property, but as persons; and it did not establish slavery or give any sanction to it, save in the single respect of the return of fugitives from service.

3. A remedy on a contract which is against sound morals, natural justice and right, may exist by virtue of the positive law under which the contract was made; but such remedy can only be enforced so long as that law remains in effect. As such remedy derives all its support from the statute, it cannot for any purpose survive its repeal.

4. The new Constitution of Arkansas declaring that "all contracts for the sale and purchase of slaves were null and void," is not in conflict with the clause of the Constitution of the United States prohibiting any state from passing any law impairing the obligation of contracts, which clause does not operate so as to perpetuate the institution of slavery or any of its incidents, these being matters over which the states had unlimited control.

5. The 13th amendment to the Constitution of the United States *ipso facto* destroyed the institution of slavery and all of its incidents, and put an end to all remedies growing out of sales of slaves.

7. In view of the 13th and 14th amendments to the Constitution of the United States, the court holds that a remedy on a contract for the sale of slaves is contrary to the spirit of their provisions, against public policy, and can not be maintained.

And again in *Buckner* v. *Street*, the same court, CALDWELL, J., reasserted its opinion to the same effect, holding:

1. Contracts for the purchase and sale of slaves are against sound morals, natural justice and right, and have no validity unless sanctioned by positive law.

2. A remedy on such contracts may exist by virtue of the positive law under which they were made, but such remedy can only be enforced so long as that law remains in force.

3. The 13th article of amendment to the Constitution of the United States repealed all laws sanctioning slavery, and the traffic in slaves and the right of action on slave contracts does not survive such repeal, founded as it is on the supreme authority of the people of the United States.

4. The rule that statutes should not receive an interpretation that will give them a retrospective operation, so as to divest vested rights of property, and perfect rights of action, has no application, so far as relates to slaves and slave contracts, in the construction of the 13th article of amendment of the Constitution of the United States.

J. T. M.

Supreme Court of Colorado.

MAHALA LOUGEN *v.* B. PLATTE CARPENTER.

By the statute of Colorado a mortgage is not assignable so as to cut out any defence of the mortgagor, and the fact that it was given as security for a negotiable note does not alter its character in that respect.

The assignment of a negotiable note secured by mortgage carries the mortgage with it as an incident, but this is so only in equity, and if the assignee comes into equity to foreclose the mortgage he will be made to do equity in regard to any defence the mortgagor may have against the original mortgagee.

A promissory note though secured by mortgage is still negotiable, and when a holder for value who took in good faith before maturity sues on the note at law he will be entitled to judgment for the full amount of the note; but if he goes into equity to foreclose the mortgage the court will let in any defence that would have been good against the mortgagee himself.

A. made a promissory note to B. and secured it by a mortgage, and also by a quantity of wheat delivered to B. to be sold and the proceeds applied in payment of the note. B. sold a portion of the wheat but did not apply the proceeds to A.'s credit, and subsequently assigned the note and mortgage to C. On a bill in equity by C. to foreclose the mortgage, it was held that A. could recoup the value of the wheat sold by B. before the assignment.

On appeal from the Jefferson District Court.

This was a bill in chancery to foreclose a mortgage filed by the appellee as assignee of one Jacob B. Carpenter. The mortgage was given to secure a negotiable note. The mortgage bore date March 5th 1867, and was payable to Jacob B. Carpenter or his heirs or assigns, and was by him assigned to the complainant on the 20th July 1867. The assignment was properly recorded on the 7th February 1868.

The defendant in her answer denied all knowledge of the assignment, and averred that at the date of said mortgage, she, in addition to said mortgage security, delivered to the said Jacob B. Carpenter, as collateral, and further security for the payment of the said sum of money, specified in said note and mortgage, one hundred and three sacks of good merchantable wheat flour, then of the value of $1236, and seven thousand five hundred pounds of wheat, of the value of $450, which she alleged, said Carpenter agreed to sell and apply to the payment of the sum due him on said note and mortgage, or if not sold, to be returned on payment or tender of payment of said note and mortgage. She further charged, that said Carpenter sold said flour and wheat, and

appropriated the sum to his own use, and refused to account to her for the proceeds.

The opinion of the court was delivered by

BELFORD, J.—The principle involved in this case has never been before adjudicated on, in this territory, and in the states where it has received judicial notice, the decisions are in direct conflict.

It is claimed by the appellee that the note secured by the mortgage is a negotiable note; that it was negotiated before due, and that the assignee, being a *bonâ fide* purchaser of the note without note, took it and the mortgage freed, and discharged from all equities and defences that existed in favor of the mortgagor and against the mortgagee.

There is no evidence showing that B. Platte Carpenter had, before or at the time of the assignment of the note, any knowledge of the wheat and flour given by Mahala Lougen as further security to Jacob B. Carpenter.

It is contended by the appellant, that having taken security by way of mortgage, that security qualifies the rights of the mortgagee, and those claiming under him; and that when an action is brought to foreclose the mortgage, that instrument, together with the note secured thereby, passes into the category of obligations to which defences and equities may attach and be made available, into whosesoever hands they fall. We are free to admit that this question is surrounded with great difficulties, and deeply regret that no settled and uniform rule exists in this country on the subject. The Supreme Courts of Wisconsin, Michigan and Illinois, so far as we have been able to discover, are the only courts that have passed upon the matter in controversy. In Illinois the rule is laid down as claimed by the appellant. They hold there, that although the note secured by the mortgage is negotiable, still it is open to whatever defences existed against the mortgagee. A different rule obtains in Wisconsin and Michigan. Amid this conflict of authorities, we feel at liberty to choose our course, and shall endeavor to follow that which in our judgment is sustained by the better reason.

What relation does a mortgage sustain to a note secured by it?

In one sense it is a mere incident to the debt. He who owns

the note, owns the mortgage. The assignee of the former is entitled to the benefits of the latter; although the assignee did not know of its existence: *Keyes* v. *Wood*, 21 Vermont 331.

But it must be borne in mind that these principles are the outgrowth of equity and equity alone. At common law, choses in action were not assignable. For the convenience of commerce, by the statute of Anne, in England, certain choses in action were made assignable, so as to vest in the assignee the legal title, as promissory notes and bills of exchange. We have a statute to the like effect, which provides that any promissory note, bill, bond, or other instrument in writing, whereby one person promises to pay another any sum of money, or article of personal property or sum of money in personal property, shall be assignable by endorsement thereon. The mortgage, to foreclose which this bill was filed, was given to secure the payment of a promissory note, which was assigned by the payee and mortgagee to the complainant. This was in equity, an assignment of the mortgage. The note was assignable by the statute, but the mortgage was not, nor was it assignable by the common law. The assignee of a mortgage has no remedy upon it by law, except it be treated as an absolute conveyance, and the mortgagee convey the premises by deed. The Revised Statutes of Colorado (sect. 22, page 377) provide that if default be made in the payment of any sum of money secured by mortgage on lands and tenements duly executed and recorded, it shall be lawful for the mortgagee, his executors or administrators, to sue out a writ of *scire facias*, &c. Here the remedy is specifically confined to the mortgagee, his executors and administrators. The assignee cannot proceed at law and sue out a *scire facias*; to avail himself of his mortgage security, he is driven to the Court of Chancery. His remedy is purely equitable, and seeking equity he must be willing to do equity. He who buys that which is not assignable at law, relying upon a Court of Chancery to protect and enforce his rights, takes it subject to all infirmities to which it is liable in the hands of the assignor, and the reason is, that equity will not lend itself to deprive a party of a right which the law has secured him, if such right is intrinsically just of itself.

"Mortgages," says Chief Justice CATON, in *Olds* v. *Cummings*, 31 Illinois 192, "are not commercial paper. It is not

convenient to pass them from hand to hand, performing the real offices of money in commercial transactions, as notes, bills, and the like. When one takes an obligation secured by a mortgage, relying upon the mortgage as security, he must do it deliberately, and take time to inquire if any reason exists why it should not be enforced; while he may take the real promise to pay the money as commercial paper and depend upon the personal security of the parties to it. It may be said to be a distinguishing characteristic of commercial paper, that it relies upon personal security, and is based upon personal credit. It is a part of the credit system which is said to be the life of commerce, which requires commercial instruments to pass rapidly from hand to hand. Mortgage securities are too cumbersome to answer these ends. The note itself, though secured by a mortgage, is still commercial paper, and when the remedy is sought upon that, all the rights incident to commercial paper will be enforced in the courts of law. But when the remedy is enforced through the medium of the mortgage; when that is the foundation of the suit, and the note is merely used as an incident to ascertain the amount due on the mortgage, then the courts of equity to which resort is had, must pause and look deeper into the transaction, and see if there be any equitable reason why it should not be enforced. He who holds a note, and also a mortgage, holds in fact two instruments for the security of the debt: first the note with its personal security, which is commercial paper and as such may be enforced in the courts of law, with all the rights incident to such paper; and the other, the mortgage, with security on land, which may be enforced in the courts of equity and is subject to the equities existing between the parties. The right of an assignee to set at defiance a defence which could be made against the assignor, is an arbitrary statutory right created for the convenience of commerce alone, and must rely upon the statute for its support, and is not fostered and encouraged by courts of equity."

This doctrine, so clearly enunciated by Ch. J. CATON, is reasserted and enforced by C. J. WALKER, in the case of *Walker* v. *Dement*, 42 Ill. 273. In delivering the opinion in this latter case he says: " that while the purchaser of a note, before maturity without notice, will be protected against all defences to the note, still, if it is secured by mortgage or other collateral security, the assignment will not cut off prior equities against the mortgage or

collateral fund, although they might be secret and latent. There are many cases in which assignees have been protected against latent equities of third persons, whose rights and even names do not appear upon the face of the mortgage. And the reason is, that it is the duty of the purchaser to inquire of the mortgagor if there be any reason why it should not be paid; but he should not be required to inquire of the whole world, to see if some one has not a latent equity, which might be interfered with, by his purchase of the mortgage, as for instance a *cestui que trust.*"

In the case of *Merry* v. *Sylburn*, 2 Johnson Ch. 441, Chancellor KENT said: "It is a general and well settled principle, that the assignee of a *chose in action* takes it subject to the same equities it was subject to in the hands of the assignor. But this rule is generally understood to mean the equity residing in the original obligor, and not an equity residing in some third person against the assignor."

In *Westfall* v. *Innes*, 23 Barbour 10, the court said: "Does the plaintiff, being a *bonâ fide* purchaser and assignee of the bond and mortgage, stand in any better condition than the person from whom he derived his title? It is a well settled principle that the assignee of a *chose in action* takes it subject to all equities which existed against it in the hands of the assignor."

The same rule is laid down in Pennsylvania in *Mott* v. *Clark*, 9 Penn. St. R. 399, and in *Pryor* v. *Wood*, 31 Penn. St. R. 142.

It may be objected to these decisions that the mortgage in each of the cases was given to secure a bond, and that the bond having no commercial character, the party taking an assignment would as a matter of course take the mortgage burdened with infirmities which the statute prescribes shall not apply to negotiable notes, transferred before due. These cases are made to rest on another and different ground, namely: that the proceeding was on the mortgage itself, and there being no express statutory provision authorizing the assignment of the mortgage. But it may be urged that the mortgage is accessory to the note; that it is attached to it; and being so attached it is and must remain inseparable. This is true so long as both instruments remain in the hands of the mortgagee. But when he assigns the note, there is in law a separation. The assignee can take his note into a

court of law and recover a judgment upon it, but he cannot take the mortgage there; he cannot claim the benefits of it there. He is confined simply to his remedy on the note. Whatever judgment he recovers is purely a personal one. He will not be heard to say that the maker of the note pledged a special fund out of which the debt must be satisfied. The court could reply and with reason, whatever your rights may be in equity, one thing is certain: there is no law authorizing your assignor to transfer to you the mortgage. It does not follow you into this court.

How is it when he brings his action on the mortgage in a court of equity? There the mortgage is the foundation of the suit, and the remedy sought is the foreclosure of the equity of redemption. The note is used to compute the amount; it has no other office to perform. The mortgage in one sense, and in an important one too, has a character of its own. If one holds a note against which the Statute of Limitations has run, and also a mortgage or pledge of real or personal property to secure it, he cannot sue on the note, but he can take and hold possession of the property and sell it, if it be personal property, with proper precautions, and if real property he can have a bill in equity to foreclose his mortgage, and if his lien fails to pay the whole of his debt he loses the remainder, because he can have no action upon it although he may have proper process founded upon the debt and security to establish his lien and make it available in the payment of his debt. A mortgage may be enforced so long as it is available, although the debt secured by it, is barred by the Statute of Limitations: Parsons on Contracts, vol. ii. 379; 20 Mo. 482; Angell on Limitations, pages 77 and 78. This is sufficient to show that it has a character of its own. But it may be urged that if this had been an action at law on the note itself, that the assignee could not have been chargeable with equities or defences which might have existed against the same in the hands of the assignor or original payee, and of which the complainant was ignorant at the time of assignment, and that it being commercial paper, he could have obtained judgment for the full amount expressed in the note, and on execution this same land described in the mortgage might have been levied on and sold to satisfy the same. Admitting this to be true, yet in that case the

purchaser of the land under the sale would hold it subject to the mortgagor's right of redemption: *Thornton* v. *Pegg*, 24 Mo. 247.

There is a reason why in an action on the note he would be entitled to recover the full amount, namely: a court of law cannot take cognisance of equities that in a court of chancery would not only be recognised, but rigorously enforced. The books are full of cases where a judgment has been rendered in a law court against a defendant one day, and the same judgment enjoined by a court of chancery the next. It is true that the principles governing and controlling a court of chancery are as fixed and certain as are those which control a court of law, and one of those principles is, that he who invokes its equitable powers must be ready to do equity.

But this discussion has already been protracted to a sufficient length. What was the equity of the mortgagor in this case? What relation did Jacob B. Carpenter sustain to the wheat and flour received by him as security in addition to the mortgage, and how far is the complainant affected thereby. We think it was a pledge. The contract of pledge is a bailment or delivery of goods and chattels by one man to another to be holden as a security for the payment of a debt or the performance of an engagement and upon the express or implied understanding that the thing deposited is to be restored to the owner as soon as the debt is discharged or the engagement has been fulfilled. The contract is to be distinguished from the contract of hypothecation, by the transfer of the possession or the delivery of the thing intended to be charged to the creditor; and from the contract of mortgage by the absence of a transfer of the ownership or right of property therein in the pawnee during the continuance of the trust. If the thing intended to be burthened with the debt or charge remains in the possession and under the disposition of the owner there is no pledge. By a pledge, therefore, of the goods and chattels the right of possession is altered, but not the right of property.

Were the wheat and flour in the possession and under the control of Jacob B. Carpenter? He had the receipt of the warehousemen for it. Mahala Lougen could not have conveyed the same to any one, freed and discharged from his lien upon it. Miller & Williams, the warehousemen, were liable to him on their receipt, for the amount expressed in it. If any one had carried away and

converted the wheat to his own use, Carpenter could have maintained an action for it, and the production of the receipt in evidence would have been proof of his title. Part of this wheat and flour, while in the possession and under the control of Jacob B. Carpenter, and before the assignment of the note, was sold, and the money paid to Miller & Williams his depositaries. He recognised them as his agents by accepting their receipt. And the money paid to them for the wheat and flour sold, was equally under his control, and could have been collected by him. If he failed to apply this money to the payment of the note and mortgage, and allowed it to remain in their hands until it was dissipated and squandered, he must suffer the loss; not Mahala Lougen, who had no right to the possession of it. And if, in an action by Jacob B. Carpenter, Mahala Lougen would have been entitled to recoup the amount of money paid to Miller & Williams for the wheat pledged, under the rule we have announced in this opinion, his assignee stands in no better position, and this money so paid must operate as a satisfaction *pro tanto* of the note and mortgage.

For the failure of the court below to allow credit on the mortgage for the wheat sold prior to the assignment of the note, this case must be reversed and remanded. It is accordingly reversed with costs, for further proceedings in accordance with this opinion.

HALLETT, C. J., dissenting.—The nature of a mortgage and its relations to the indebtedness it is intended to secure, are pretty well understood at this day and do not demand much discussion. In *Martin* v. *Mowlin*, 2 Burr. 978, Lord MANSFIELD said: "A mortgage is a charge upon the land, and whatever will give the money will carry the estate in the land along with it to every purpose. The estate in the land is the same thing as the money due upon it."

So also KENT, C. J., in *Jackson* v. *Willard*, 4 Johns. 43: "Until foreclosure, or at least until possession taken, the mortgage remains in the light of a chose in action. It is but an incident to the debt, and in reason and propriety, it cannot, and ought not to be, detached from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned,

the assignee must hold the interest at the will and disposal of the creditor who holds the bond. '*Accessorium non ducit sed sequitur principale.*'"

To the same effect are all the authorities, and no one can now be found to question the doctrine, that a mortgage is a mere incident to the indebtedness it is intended to secure, inseparable from it and incapable of existence without it. It is a truism of the law, that a mortgage is a security for indebtedness, accompanying the latter through all hands, and ultimately sharing the same fate. This rule, which identifies the security with the indebtedness, in my opinion, requires that the remedy upon the security shall be co-extensive with that on the debt. When this is denied the mortgage is divested of its character as a security to the extent of such denial. By the mortgage contract a lien is given upon property for the payment of certain indebtedness, and if the indebtedness be withdrawn from the lien, or if the existence of the lien be denied for causes *dehors* the mortgage, that instrument is divested of its essential quality in the face of its express provisions. That is no security for indebtedness which will not come up to the point of contributing to its payment, and a mortgage intrinsically good, which falls short of the measure of its principal, is a paradox unknown to the law. To illustrate, let us look for a moment at the present case.

A negotiable note, secured by mortgage, was endorsed to appellee before maturity upon a valuable consideration. It does not appear that the pledged property was delivered to appellee, or that he had any knowledge of it; so that no notice need be taken of that feature of the case. Neither law nor equity will deny to the appellee, as a *bonâ fide* holder for value, the full amount of the note, when that instrument is presented. But it is said that the action being to foreclose the mortgage, the amount of the note must be diminished by the sum received by the payee or his agents before the assignment to appellee. The mortgage is in itself valid and effectual, according to its legal character, as a security for the indebtedness evidenced by the note. The note is intrinsically good, and in the hands of the appellee constitutes a demand against the appellant for the amount expressed upon its face. Each instrument is perfect in itself; the one as a demand against appellant, other as security for that demand, and yet when united, and a remedy to enforce the lien is sought, the security of the mortgage is denied

as to a portion of that demand. In other words, the mortgage has ceased to be security as to part of the indebtedness evidenced by the note, its express provisions to the contrary notwithstanding. It appears to me that the mortgage having been made as a security for the payment of the note, it ought to stand as a security for the whole note, extinguishable only upon payment of the whole amount recoverable upon it. Any other view is opposed to the rule which unites the mortgage to the indebtedness inseparably, and gives to them a common existence. In this connection I will ask attention to the language of the Supreme Court of Wisconsin upon this subject:—

"The doctrine that an assignee can enforce the mortgage for no more than is justly and actually due between the mortgagor and the mortgagee had its origin at a time when the practice of giving mortgages as collateral security for the payment of negotiable paper was wholly unknown, and was made to rest upon the ground that such would be the rule adopted in a suit at law, upon the covenant or bond to which the mortgage was collateral; and the assignee should stand no better in equity than at law. The reason of the rule being, that because in a suit at law for the use of the assignee upon the bond or covenant, to collect the debt, a recovery cannot be had for a greater sum than is actually due from the mortgagor to the mortgagee, therefore no more shall be recovered in equity in an action to foreclose the mortgage; or that the parties as to rights and remedies shall stand upon the same footing in both courts: it follows as a logical conclusion, that when the nature of the instrument evidencing the debt and the circumstances of the transfer are such that in a suit at law upon it against the mortgagor, the assignee can enforce its payment regardless of any equities existing between the mortgagor and mortgagee, he should have the same rights and remedy in equity. The reason of the rule ceasing in the case of negotiable securities, transferred before maturity and without notice, the rule also ceases. The debt is the principal thing, the mortgage the incident. The transfer of the debt carries with it the mortgage. It is the debt which gives character to the mortgage, and fixes the rights and remedies of the parties under it, and not the mortgage which determines the nature of the debt:" *Croft* v. *Bunster*, 9 Wis. 509. See also *Dutton* v. *Ives*, 5 Mich. 519; *Reeves* v. *Scully*, Walker's Ch. 248.

Another consideration of great weight ought not to pass unnoticed. It is conceded that the appellee may recover in an action at law upon this note, that portion of his demand which is denied to him in this proceeding. It was said by HOSMER, C. J., in *Clark* v. *Beach*, 6 Conn. 159, "The equitable doctrine, concerning the rights of mortgagor and mortgagee, has gradually been naturalized in the common-law code; and by the adoption of principles long established in chancery, and tenaciously adhered to, the suitors are not driven from one bar by increased litigation and expense to obtain infallible relief at another."

The policy of the law, here defined, has not, I think, been heeded in this case. The appellant is protected from the payment of a portion of the appellee's demand to which she must hereafter respond in a court of law; while the appellee is driven from this bar by increased litigation and expense to obtain infallible relief at another.

The case of *Olds* v. *Cummings*, 31 Ill. 188, is the authority upon which the decision of this court is based, and that case is grounded upon the assumption that a foreclosure suit is brought upon a mortgage only. The court in that case say: "The note itself, though secured by a mortgage, is still commercial paper, and when the remedy is sought upon that, all the rights incident to commercial paper, will be enforced in the courts of law. But when the remedy is sought, through the medium of the mortgage, when that is the foundation of the suit, and the note is merely used as an incident to ascertain the amount due upon the mortgage, then the courts of equity, to which resort is had, must pause and look deeper into the transaction, and see if there be any equitable reason why it should not be enforced."

Upon this, I am of opinion, that a foreclosure is founded upon the indebtedness, as well as the mortgage. A court of equity will not, and in the nature of things cannot permit a mortgagee to recover unless he is the holder of the indebtedness, secured by the mortgage: 1 Hilliard on Mortgages, Chap 2, s. 5.

Whether the proceedings be at law or in equity, the indebtedness is the principal thing, for both remedies are designed to enforce payment of the money. I concede that the remedy at law is upon the note alone, but it is equally plain that the suit in equity is founded upon the note and mortgage, and that each is essential to the right of recovery. The indebtedness is the

encumbrance, and the mortgage is the means by which the encumbrance is attached to the estate. If either be removed there is nothing remaining upon which the court can act. In a proceeding to foreclose a mortgage, it is the duty of the court to ascertain the amount of the indebtedness as well as to enforce the lien upon the mortgaged property for its payment, and while the mortgage will show the lien, it is rarely evidence of the indebtedness. Sometimes a covenant for the payment of the money is inserted in the mortgage, but usually a bond, note, or other separate instrument is executed for the purpose of showing the amount of the indebtedness. When the indebtedness is evidenced by a separate instrument, a court of equity is as much bound to give effect to that instrument as to the mortgage.

In this case the note is evidence of the amount of the indebtedness, just as the mortgage is evidence of a lien upon certain property for the payment of that indebtedness; and the court is bound to give effect to the first as well as the second. The note is the legal and unquestionable evidence of the indebtedness, as the mortgage is evidence of the lien; and each, according to its office, determines the rights of the parties. It is impossible to say that there is anything due upon the mortgage disconnected from the note, for the reason that the note alone determines the amount of the indebtedness.

The Supreme Court of Illinois say that the note is "merely used as an incident to ascertain the amount due upon the mortgage." But it is plain that no such use was made of the note in that case. The note called for the amount expressed upon its face, but the court refused to recognise the demand. The mortgage referred to the note as the standard of indebtedness, but the court rejected the note in violation of the express language of the mortgage. And this was done for the avowed purpose of protecting the mortgagor from making payment to the innocent holder of negotiable paper. I am not able to perceive that the former occupies a higher position in a court of equity than the latter, or that there is any reason for setting aside the rules of law applicable to commercial paper in cases of this kind.

The opinion of that court, as well as that announced by this court, is open to other criticism; but I think that I have shown that the ruling of the District Court was correct, and that the decree of that court should be affirmed.